

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LUIS ALBERTO LOPEZ-CERDA,

Defendant.

No. CR-99-2026-JLQ  
CV-05-122-JLQ

ORDER DENYING DEFENDANT'S  
MOTION TO VACATE, SET ASIDE,  
OR CORRECT SENTENCE AND  
CLOSING THE FILE

Assistant United States Attorney **Jane Kirk** represented the Government in this matter during plea negotiations and at sentencing. **Luis Alberto Lopez-Cerda** has filed this 28 U.S.C. § 2255 motion *pro se*.

Defendant contends that sentencing enhancements were applied unconstitutionally in violation of *United States v. Booker*, 543 U.S. \_\_\_, 125 S.Ct. 738 (2005). Defendant was sentenced and Judgment was entered in this matter on August 16, 1999. Defendant waived his direct appeal as a part of the plea agreement. Defendant filed this § 2255 motion on April 26, 2005, over five years after his Judgment became final. Under 28 U.S.C. § 2255, a 1-year period of limitation applies to the filing of a motion to set aside, vacate, or correct sentence. Defendant's time for filing such motion has expired.

Defendant implicitly recognizes that his motion is untimely and invokes the following language from 28 U.S.C. § 2255 in an attempt to preserve his claim: "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of . . . (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court **and**

ORDER

1 **made retroactively applicable** to cases on collateral review"(emphasis added).

2 The Supreme Court has not declared that *Booker* applies retroactively, and  
3 Defendant has not cited to, nor is the court aware of any federal court decision declaring  
4 that *Booker* applies retroactively to cases where the judgment of conviction was final  
5 prior to *Booker* and the time for filing a § 2255 has expired. The Supreme Court is  
6 unlikely to make such a ruling. See *Schiro v. Summerlin*, 124 S.Ct. 2519 (2004)(holding  
7 that *Ring v. Arizona*, 536 U.S. 584 (2002), a case which determined that a capital  
8 sentencing scheme wherein the judge could decide aggravating facts without a jury was  
9 unconstitutional, did not apply retroactively to cases on habeas review). Additionally,  
10 several federal Circuit courts have determined that *Booker* claims cannot be raised under  
11 § 2255 if the conviction was final prior to *Booker*. See *Guzman v. United States*,  
12 \_\_F.3d\_\_ (2nd Cir. April 8, 2005); *Humphress v. United States*, \_\_F.3d \_\_ (6th Cir.  
13 February 25, 2005); *McReynolds v. United States*, 397 F.3d 479 (7th Cir. February 2,  
14 2005); *Varela v. United States* \_\_F.3d \_\_ (11th Cir. February 17, 2005). Lastly, prior to  
15 *Booker*, the Ninth Circuit Court of Appeals noted that the Supreme Court had not made  
16 *Blakely* retroactive to cases on collateral review and refused to entertain § 2255 motions  
17 contending that it should be so applied. See *Cook v. United States*, 386 F.3d 949 (9th Cir.  
18 2004).

19 If the Supreme Court should hold that *Booker* applies retroactively, Defendant may  
20 be allowed to file a § 2255 motion at a later date, pursuant to 28 U.S.C. § 2255(3), which  
21 states that the 1-year limitations period may run from "the date on which the right  
22 asserted was initially recognized by the Supreme Court, if that right has been newly  
23 recognized by the Supreme Court and made retroactively applicable to cases on collateral  
24 review". However, at this time, the motion and files and records of this case conclusively  
25 show that Defendant is entitled to no relief as the motion is time-barred.

26  
27  
28 Accordingly,

ORDER

**IT IS HEREBY ORDERED:**

1. Defendant's Motion to Vacate, Set Aside, or Correct sentence is **DENIED**. (Ct. Rec. 63).

**IT IS SO ORDERED.** The Clerk of the Court shall file this Order, enter a Judgment Denying the Petition For Writ of Habeas corpus, forward copies to the Petitioner and counsel for the Government, and close the file.

DATED this 4th day of May, 2005.

s/ Justin L. Quackenbush

JUSTIN L. QUACKENBUSH  
SENIOR UNITED STATES DISTRICT JUDGE